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IN THE

Supreme Court of the United States

OCTOBER TERM—1963

No. 970

In the Matter of

ANONYMOUS NO. 1, An Attorney,
Petitioner,

against

CO-ORDINATING COMMITTEE ON DISCIPLINE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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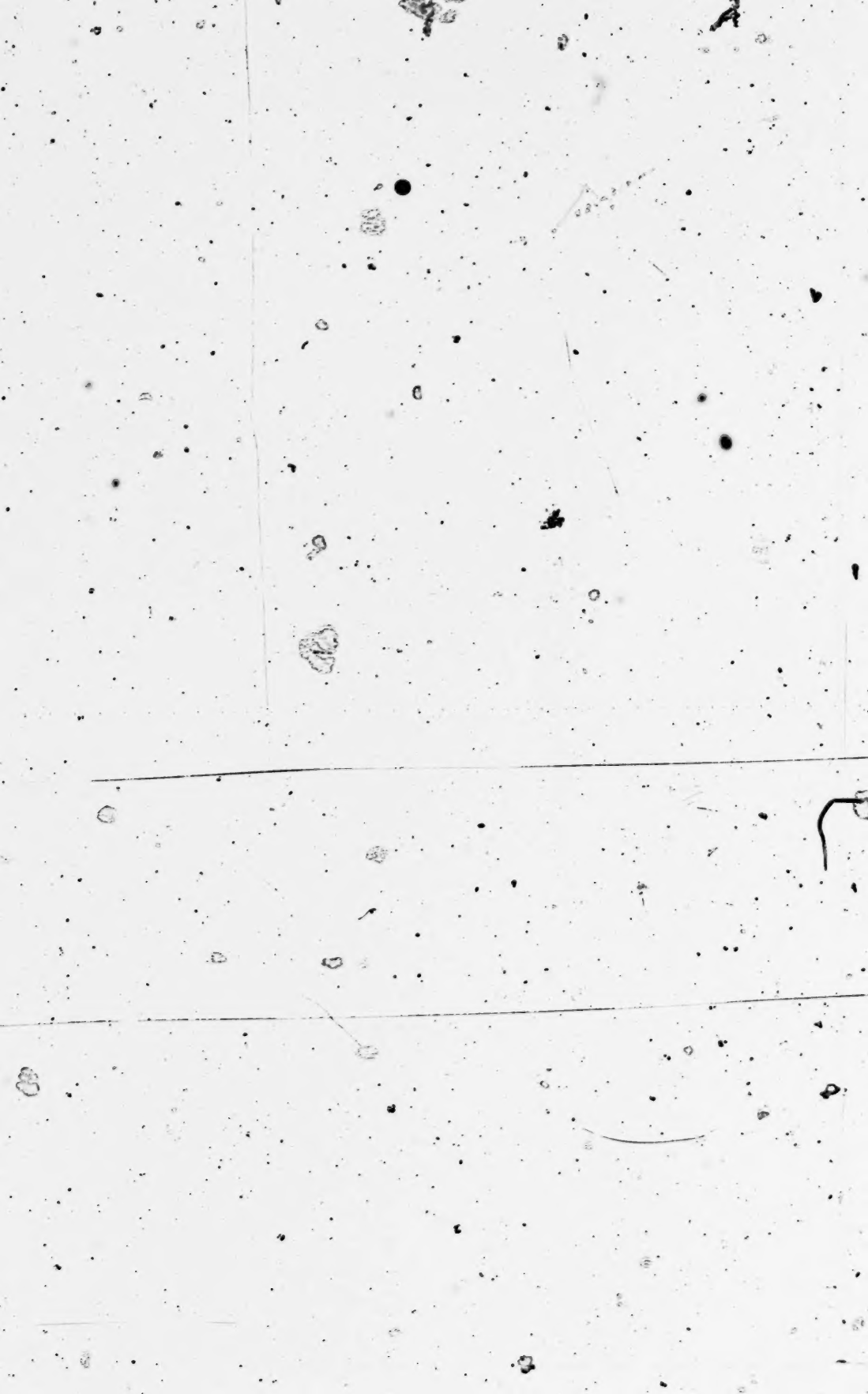

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The petitioner above-described, respectfully prays that a writ of certiorari issue in the above captioned case directed to the Court of Appeals of the State of New York to review its order dated and entered January 9, 1964. (See certified record submitted herewith.)

Opinions Below

There were no opinions in the courts below.

Jurisdiction

The order of the Court of Appeals sought to be reviewed was dated and entered January 9, 1964. Therefore, the time within which this petition for writ of certiorari might be filed will expire April 9, 1964.

The jurisdiction of this Honorable Court is invoked under Title 28 United States Code, section 1257.

Proceedings Below

Petitioner is the respondent in a disciplinary proceeding brought against him by the Co-ordinating Committee on Discipline.

Pursuant to the provisions of the Civil Practice Law and Rules[1] petitioner moved in the Appellate Division of the Supreme Court, First Department, before whom his proceeding was and still is pending, for an order granting him a discovery and inspection preliminary to trial (23-24).[2] That motion was denied without opinion (21-22). Thereafter, on October 25, 1963, petitioner timely moved for reargument before the Appellate Division, or in the alternative, for leave to appeal to the Court of Appeals. (See certified addendum to the certified record now before this Court.) On November 19, 1963, the Appellate Division denied petitioner's motion without opinion. (See certified addendum to the certified record now before this Court.) Thereafter, petitioner timely moved before the

1. Although the notice of motion was dated August 19, 1963, it was returnable on September 10, 1963. The New York Civil Practice Law and Rules, successor to the Civil Practice Act, went into effect on September 1, 1963 and the procedural remedy sought was governed by the new law.

2. Parenthetic references are to that portion of the certified record entitled Notice of Motion for Leave to Appeal to the Court of Appeals now before this Court, unless otherwise noted.

Court of Appeals for leave to appeal to that court. Said motion was dismissed on January 9, 1964, without opinion. (See certified record now before this Court.)

Questions Presented

1. In the absence of any statute or rule of court sanctioning such a denial, may an attorney, accused in a disciplinary proceeding designed to deprive him of his right to practice law, be denied the usual, ordinary, normal and regular pre-trial procedural remedies in aid of his defense, especially when such remedies are available to all other litigants in New York?

2. The Court of Appeals of New York having ruled that a disciplinary proceeding against an attorney is governed by the statutes and rules of procedure pertaining to civil proceedings, may an attorney be deprived of the benefits of the pre-trial procedures necessary to his defense provided for by such statutes and rules and thereby deprived of the equal protection of the laws and thus prejudiced in his right to make and prepare a defense to the charges against him?

3. Where, without sanction of law or rules of court providing therefor, an attorney, as the respondent in a disciplinary proceeding, is denied the normal and regular statutory pre-trial procedures available to all other litigants in New York, is such a denial of due process which renders the proceeding a nullity until the procedural remedies sought are made available?

Constitutional Provision Involved

The provision of the Constitution of the United States involved herein is the Fourteenth Amendment, the pertinent provision of which is as follows:

"Section 1. . . . nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved

New York Civil Practice Law and Rules:

"§105. Definitions.

. . . . . .

(b) Action and special proceeding. The word 'action' includes a special proceeding; the words 'plaintiff' and 'defendant' include the petitioner and the respondent, respectively, in a special proceeding; and the words 'summons' and 'complaint' include the notice of petition and the petition, respectively, in a special proceeding."

"§3101. Scope of disclosure

(a) Generally. There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(1) a party, or the officer, director, member, agent or employee of a party;

(2) a person who possessed a cause of action or defense asserted in the action;

(3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable grounds of belief that he will not be able to attend the trial; and

(4) any person where the court on motion determines that there are adequate special circumstances."

New York Judiciary Law:

90. Admission to and removal from practice by appellate division.

* * * * * * *

"2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice."

* * * * * * *

6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally, within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice

of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges. * * *"

Statement

The Nature of Respondent

The respondent Co-ordinating Committee on Discipline, is made up of the respective chairmen of the regular grievance committees of the Association of the Bar of the City of New York, the New York County Lawyers Association and the Bronx County Bar Association. By an order dated February 3, 1959, the Appellate Division, First Department, of the Supreme Court of the State of New York, directed the then newly formed committee to conduct a continuing study into the practice of negligence law in the First Department. Actually the Committee was formed only for that purpose and limits its activities to New York and Bronx counties. Unlike the grievance committees of the named bar associations, the Co-ordinating Committee is quasi-official in nature. Although the Committee members serve voluntarily, its staff is paid with public funds and is composed in part of court personnel assigned by the Appellate Division to the investigative and administrative work of the Committee. The investigative work of the Committee is aided by broad subpoena powers.

The Committee conducts its inquiry *in camera* and *ex parte*. A lawyer being investigated by the Committee is not permitted to attend or cross-examine witnesses who

appear before the Committee. As occurred in the case at bar, a lawyer may appear before the Committee if it invites him to do so, but he may not produce witnesses in his own behalf. He is limited to answering such questions as may be propounded to him before the Committee and he is not advised what, if any, charges are being considered against him. The Committee takes the position that there can be no "charges" against an attorney during its investigation and so there are no charges of which he can be advised. A lawyer appearing before the Committee "learns" of "charges" against him by the nature of the questions addressed to him.

When the Committee decides so to do, it reports on its investigation against an attorney by petitioning the Appellate Division *ex parte* to the effect that a *prima facie* case against such attorney exists and also requests that its legal staff be appointed as prosecutor of a disciplinary proceeding to be brought against such attorney (Judiciary Law, section 90).

A petition is then served on the attorney which advises him of the charges against him and which he may answer as he is advised. Thereafter a referee is appointed to hear and report to the Appellate Division with regard to the evidence adduced concerning such charges. Before hearings are held, the Committee will on demand supply a bill of particulars in amplification of the charges, but will not disclose any of its evidence in support of its charges in any bill it supplies.

With Regard to the Case at Bar

Petitioner is a distinguished member of the New York bar who has been practising for more than thirty years. Until this disciplinary proceeding was instituted against him, his record was unblemished. At the time the pro-

ceeding was begun, he was a director of one, and a member of a number of bar associations.

The present charges against petitioner stem from an appearance or appearances by two former lawyers—Irving Dansker and Bert J. Sapot—before the Coordinating Committee on Discipline.[3] Prior to their appearance before the Coordinating Committee, Dansker and Sapot had been indicted in New York County for various acts of fraud involving cases where they were the attorneys of record (the indictment set forth some twenty counts).

Dansker and Sapot (they were partners in a law firm) were allowed to plead to one count of the indictment to cover all counts and each received a suspended sentence on their promise to the sentencing court that they would furnish evidence to the Committee against "someone" not named in the indictment. It is surmised from the petition served on petitioner that the nature of their "cooperation" was to appear at *ex parte* sessions of the Committee and accuse the petitioner of responsibility for all their misconduct and to accuse him of every imaginable act of misconduct, larceny, chicanery and perfidy. (It may be surmised from the petition served on petitioner, although it is not known, that when they appeared before the Committee, Dansker and Sapot claimed that they were acting as the pawns of petitioner.)

Petitioner was never permitted to know of or attend such *ex parte* sessions.

It is significant to note that although the indictment against Dansker and Sapot named numerous co-conspira-

3. The Co-ordinating Committee to this day has not shown the petitioner the transcript of any statements or testimony by Dansker and Sapot or disclosed to petitioner the substance thereof. As a matter of fact, the Committee has refused to disclose to petitioner any of the statements, testimony or documents upon which it acted against him.

tors who allegedly acted in concert with them, the petitioner's name was not even mentioned in the indictment and no indictment ever issued against him.

As was later gleaned from the petition against petitioner (the apparent source therefor being what Dansker and Sapot must have told the Committee), it would appear that Dansker and Sapot claimed to have paid petitioner large sums *in cash*, which cash was made available from the proceeds of certain cases in which petitioner had appeared as counsel for them. The money was supposed to have been reimbursement to petitioner for monies allegedly advanced by petitioner on their behalf to finance certain illicit transactions in obtaining and disposing of the cases in which Dansker and Sapot had retained the respondent as counsel. The payments were ostensibly made over a period of about one year.

Before being charged, the petitioner was called before the Co-ordinating Committee. He was asked a series of questions which by their very nature indicated the thrust of the Dansker and Sapot accusations. He was never shown or told, however, what Dansker and Sapot had actually said.[4]

When the petitioner asked that he be confronted by Dansker and Sapot, the Committee refused such confrontation, as a matter of "policy" (36-42).

When petitioner sought to produce witnesses in his own behalf to show the facts and nature of his relationship to Dansker and Sapot, the Committee refused to hear such witnesses (25-31, affidavit before Appellate

4. Whether only Dansker of Sapot or both of them actually had appeared before the Committee was never disclosed by the Committee. Whether, if both appeared, their stories were mutually corroborative, was never disclosed.

Division with exhibits annexed thereto).[5] It is not disputed that the Co-ordinating Committee acted against petitioner without disclosing its evidence against him or hearing the witnesses he wanted to produce in his own behalf.

Bearing in mind the extraordinary cash transactions which the Committee charged as having occurred between Dansker and Sapot and petitioner, petitioner moved in the Appellate Division[6] for a discovery and inspection of the Dansker and Sapot financial records for the year involved. This motion was made pursuant to Section 3101(4) of the Civil Practice Law and Rules of New York, which section provides for such a discovery and inspection. Petitioner also simultaneously moved for an examination of the evidence against him in the possession of the Co-ordinating Committee. Petitioner's application to the Appellate Division spelled out the materiality of the discovery sought (23-31).

In substance, petitioner demonstrated that such a discovery would disclose not only whether such cash transactions did occur, but even whether such transactions could have occurred.

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5. At the hearing before the Committee on December 18, 1962, Mr. Weiner, counsel to the Committee, stated as follows:

> "This is a non-adversary proceeding, and if you propose to submit witnesses, I will object to it strenuously. The Committee has never done that before and I don't think it should start now" (41).

When petitioner's counsel pressed his application to be permitted to produce witnesses in behalf of petitioner, Mr. Burns, chairman of the Committee, stated, at the hearing of February 7, 1963, that the Committee would consider petitioner's application and, "give you a final decision on that point at a future date" (43). Before giving petitioner an answer to his application, the Committee filed its charges against petitioner (28).

6. Disciplinary charges against an attorney are brought in the Appellate Division of the Supreme Court of the State of New York pursuant to Section 90 of the Judiciary Law of New York.

The Co-ordinating Committee did not oppose petitioner's application on the merits of the discovery sought (38-43). The Committee did not dispute the materiality or relevancy of the discovery proposed. The Committee did not deny the existence of such financial records or that they would disclose what petitioner said they would. The Committee's entire opposition was simply that petitioner should not have such a discovery as a matter of "policy".

The Appellate Division denied petitioner's application without opinion; denied petitioner's application for reargument (and the constitutional issues were clearly spelled out in the application) and also denied petitioner's application for leave to appeal to the Court of Appeals; and the Court of Appeals dismissed petitioner's motion for leave to appeal.

Reasons for Allowance of the Writ

1.

Although the refusal of the Court of Appeals to act was based on grounds of non-finality, the jurisdiction of this Court is properly invoked on the authority of *NAACP* v. *Alabama*, 357 U. S. 449, 457-458, 78 S. Ct. 1163, 1169, 2 L. Ed. 2d 1488, and *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68, 68 S. Ct. 972, 976, 92 L. Ed. 1212.

Unless review is available now, petitioner will be irremediably injured for he will be frustrated in his efforts to prepare a proper defense to the charges against him.

2.

The case at bar falls within the ambit of those "*secrecy*" cases which have given rise to a number of the recent "due process" decisions of this Court.

At issue is the denial to the petitioner of the ordinary and usual discovery procedures available to all other litigants in the State of New York.

At issue is the propriety of a prosecuting Committee's withholding of evidence necessary and material to the petitioner's defense to the charges brought against him.[7]

a.

Under the Laws of New York Petitioner Is Entitled to the Discovery of the Dansker and Sapot Financial Records

New York's Civil Practice Law and Rules (hereinafter referred to as C.P.L.R.) section 3101, provides as follows:

> "There shall be a full disclosure of all evidence material and necessary in the prosecution of an action, regardless of the burden of proof, by:
>
> . . . . . .
>
> (4) any person where the court on motion determines that there are adequate special circumstances."[8]

7. With over 15,000 practising lawyers in the First Department alone, the problem is a serious one. Inquiries of similar nature are expanding in New York. Similar inquiries now exist in the Second Department. There are no published or announced rules in New York to guide pre-hearing or hearing procedures in attorneys disciplinary proceedings. Pre-hearing procedures vary from department to department within the State. The respective departments do not publish their decisions on procedural motions in disciplinary proceedings and no one knows what procedural standards will be followed in any given disciplinary proceeding instituted as a result of such inquiries. Thus, in *Matter of Friedman*, 17 A.D. 2d 644, a case in the Second Department, the published report does not reveal that prior to the beginning of hearings before the referee a discovery of the type sought here was granted. The decision granting such discovery has never been published. It is actually impossible to determine what other Departments in New York have established as the rules of procedure, assuming rules of procedure have been adopted in such Departments.

8. The same language "special circumstances" appeared in the New York Civil Practice Act, section 288, the predecessor to the

The word "action" in C.P.L.R. 3101, is defined in C.P.L.R. 105, as follows:

> "The word 'action' includes a special proceeding; the words 'plaintiff' and 'defendant' include the petitioner and respondent, respectively, in a special proceeding; and the words 'summons' and 'complaint' include the notice of petition and the petition, respectively, in a special proceeding."

In *Matter of Mathot*, 222 N. Y. S. the Court of Appeals unanimously held that a disciplinary proceeding against an attorney is a special proceeding, stating, at page 9, as follows:

> "The proceedings in the Appellate Division, relating to attorneys and counsellors at law, have long been treated by the courts as special proceedings within the provisions of the Code of Civil Procedure. (Sections 3333, 3334; 3433, subd. 20; *Matter of Cooper*, 22 N. Y. 67; *Matter of Percy*, 36 N. Y. 651; *Matter of Attorney*, 83 N. Y. 174; *Matter of Droege*, 197 N. Y. 44; *Matter of Robinson*, 209 N. Y. 354.)"[9]

See also,

Matter of Spencer, 137 App. Div. 330.

Mathot, has never been reversed or modified. Inasmuch as the C.P.L.R. provides for a discovery in a special proceeding such as a disciplinary proceeding is, petitioner has been deprived of the benefit of the C.P.L.R. in aid of his defense.

This Court, in *Willner v. Committee of Character and Fitness*, 373 U. S. 96, 83 S. Ct. 1175, held that even an

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C.P.L.R. It has long been held that special circumstances exist where it is shown that the evidence sought to be elicited is in the possession of a witness not a party to an action or special proceeding. *Matter of Moritz*, 10 Misc. 2d 101, aff'd 5 A.D. 2d 830. In the case at bar it is not disputed that the financial records sought are in the possession of the two principal accusers of the petitioner—Danisker and Sapot who are not parties to this proceeding.

9. The Code of Civil Procedure was the predecessor practice act in New York to the Civil Practice Act.

applicant for admission to the Bar of the State of New York was entitled to procedural due process which, in that case, referred to the right to confrontation and cross-examination. It follows that if due process is the right of an applicant to the Bar, then due process is certainly the right of one who, having been admitted, is threatened with expulsion.

In the *Willner* case, the dissenting opinion did not take issue with the holding by the majority, at page 105, that the petitioner, "had no opportunity to ascertain and contest the bases" of the Character Committee's reports, and of the concurring opinion, at page 108, that the petitioner was entitled to be informed "of the factual basis of the conclusion and * * * afforded an adequate opportunity to reply or explain."

In the case at bar we deal with the fact that, in New York, although statutorily available discovery procedures provide every other type of respondent with an adequate opportunity to defend against a petition, such discovery procedures were denied to the petitioner.

This Court in *Cohen* v. *Hurley*, 366 U. S. 117, 81 S. Ct. 954, ruled that an attorney, because of his special position, may be disciplined for asserting his privilege against self-incrimination. Nothing in that opinion, however, even suggested that when he pleads his innocence to a charge against him he should also be deprived of the normal and ordinary procedural remedies available to all other defendants and respondents. Such a disability is not a reasonable or fair incident of the privilege of serving as an attorney. As the majority of this Court stated in *Cohen*, at page 129:

> "The issue is not, of course, *whether* lawyers are entitled to due process of law in matters of this kind, but, rather *what* process is constitutionally

> due them in such circumstances. We do not hold that lawyers, because of their special status in society, can *therefore* be deprived of constitutional rights assured to others, but only, as in all cases of this kind, that what procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and that history is surely relevant to these inquiries."

Traditionally, in New York, bar associations have been the prosecutors of disciplinary proceedings. If the procedures of the Association of the Bar of the City of New York can serve as an historic guide, then full and complete disclosure has been the historic rule. Confrontation of witnesses during the course of preliminary investigation, examinations of evidence by the respondent, disclosure of contentions and the evidentiary reasons therefor, have always taken place and still take place long before a disciplinary proceeding is commenced. Thus, historically, attorneys prosecuted by the Association of the Bar have been accorded every opportunity to learn of the evidence against them and to prepare their defense.

Now come the respondents herein, first organized in 1959, and contend that all this must now change, and not only shall confrontation and disclosure be denied to an attorney during the investigative stage of its activities,[10] but that even after charges are preferred against him the pre-trial discovery procedures provided by law to a respondent should also be denied him. As against full disclosure which is the tradition in disciplinary proceedings against attorneys in New York, the respondent here now invokes a rule of complete secrecy.

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10. Petitioner is not concerned here with this phase of the respondent's position.

It is respectfully submitted that the denial of due process and of an equal application and protection of the laws to the petitioner here is self-evident and merits consideration by this Court at this stage of the proceedings.

b.

On the Full Disclosure Phase of this Petition

Petitioner also seeks a full disclosure by respondent of all evidence adduced against him in the course of respondents' *in camera* inquiry. Respondents have refused to accede to this demand although respondents have never denied that they are in possession of evidence favorable to petitioner's defense.

In justifying this denial, respondents rely on the rule in *People* v. *Rosario*, 9 N. Y. 2d 286, a criminal case, not a disciplinary proceeding. Thus, as respondents stated in their brief to the Court of Appeals.[11]

> "Upon the trial of this matter, which is yet to take place before the Referee appointed by the Court below, whenever a witness for petitioners (respondents here) in the disciplinary proceeding completes his testimony upon direct examination, a copy of the transcript of his testimony in the preliminary inquiry will then be delivered to respondent below upon request, so that it may be used to point up any inconsistencies which may exist in the testimony given by the witness, or for any other legitimate purpose."

Obviously respondents' position is that they will not produce any statements or evidence made by or received from witnesses whom they decide not to call at the hearings.

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11. See page 6 of respondents' brief to the Court of Appeals.

Petitioner here submits that he is entitled to *all* the evidence he seeks *before* the hearings so that he may *prepare a proper and full defense.*

If the rule in criminal cases is to be applied to this disciplinary proceeding against an attorney, then in *Brady v. State of Maryland*, 373 U. S. 83, 83 S. Ct. 1194, the Court stated, at page 87:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

In *Brady* the demand for disclosure was made *before* the trial.

In *United States ex rel Meers v. Wilkins*, 326 F. 2d 35, (C.C.A. 2, January 6, 1964)[12] it was held that the obligation to disclose exists even if no demand for disclosure is made. The Court stated, at page 37:

> "The case before us differs from Brady in that the defense counsel here never requested the disclosure of evidence from the prosecution, but we think that such request is not a sine qua non to establish a duty on the prosecution's part. It is important that the Supreme Court's opinion in Brady agreed with the Maryland Court that the decisions in U. S. ex rel. Almeida *v.* Baldi (195 F. 2d 815 [3 Cir. 1952] cert. denied, 345 U. S. 904 (1952), and U. S. ex rel Thompson *v.* Dye (221 F. 2d 763 [3 Cir.]) certificate denied sub nomine Pennsylvania *v.* United States ex rel Thompson (350 U. S. 875 [1955]), state the correct constitutional rule regarding the obligation of a prosecutor to disclose exculpatory evidence."

12. Relator successfully sought release from a New York State penitentiary 20 years after conviction on the ground that the prosecution suppressed evidence which may have been favorable to him.

The only way in which petitioner will ever learn if there is evidence favorable to him will be if he is allowed to examine the statements and testimony in respondents' possession and also allowed to examine the documentary evidence in respondents' possession. Anything less must of necessity constitute a denial of due process, for certainly petitioner is entitled to the same disclosure as that afforded in aid of the defense of the lowliest criminal. As the Court stated in *Brady*, at page 87:

> "A presentation that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecution in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, this action is not 'the result of guile' to use the words of the Court of Appeals. 226 Md., at 427, 174 A. 2d at 169."

The disclosure here sought is not directed at respondents' work product, but is limited to the testimony and statements of witnesses and to documentary evidence in the possession of respondents. It is only by way of such a disclosure that petitioner can prepare a full and complete defense. In essence, respondents have a simple burden of fairness. If they wish to prosecute, let them disclose. If they do not wish to disclose, then let them not prosecute.

United States v. *Andolshek*, (C.C.A.2) 142 F. 2d 503, 506.

The extent to which disclosure will be ordered by this Court is further illustrated by *Smith* v. *Pennsylvania*, U. S. , 84 S. Ct. 763 (March 9, 1964).

It is respectfully submitted that the issue of disclosure in this important area of the law merits the attention of the Court for we deal here with the ability of a lawyer to defend himself against one of the most serious accusations that can confront any man.

CONCLUSION.

It is respectfully submitted that the issue of due process and of equal protection of the laws in the case at bar is compelling and of such importance to the administration of justice as to warrant this Court's review.

Respectfully submitted,

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New York, N. Y.

Appendix

Order of Court of Appeals of the State of New York Denying Motion for Leave to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Ninth day of January A. D. 1964.

Present—Hon. CHARLES S. DESMOND, *Chief Judge, presiding.*

Mo. No. 23

In the Matter of

ANONYMOUS No. 1, An Attorney,

Appellant,

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

A motion for leave to appeal to the Court of Appeals having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution.

A copy

GEARON KIMBALL
Deputy Clerk.

[SEAL]

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—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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POINT I—

The Order sought to be reviewed is not a final Order within the meaning of the Constitution of the State of New York, and the petition for a writ of certiorari should be denied on the ground of non-finality 4

(A) Petitioner has not exhausted his remedies below. He has made no demand as yet for a bill of particulars 4

(B) The general policy of this Court is not to grant piecemeal review of litigation which has not been finally determined below 5

POINT II—

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 970

In the Matter of

ANONYMOUS No. 1, *An Attorney*,

Petitioner,

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Court of Appeals of the State of New York, made and entered on January 9, 1964, which denied, on the ground of non-finality, petitioner's motion to review an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, dated October 3, 1963, which order denied petitioner's motion to reach, for the purpose of perusal prior to the commencement of the trial in a disciplinary proceeding, the minutes, and exhibits with respect thereto, of prior testimony given by witnesses in respondent's preliminary investigation of petitioner's professional conduct (R. 39).

The order of the Court of Appeals denying petitioner's motion on the ground that the order of the Appellate Division sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution of the State of New York is reported at 13 N. Y. 2d 1119.

Statement of the Case

The supervision of the professional conduct of attorneys in the State of New York is imposed by statute upon the Appellate Division of the Supreme Court (subdivision 2 of 90 of the Judiciary Law). The inherent power of the State to regulate the supervision and control of attorneys is well established. *Gair* v. *Peck*, 6 N. Y. 2d 97 (1959); cert. denied, 361 U. S. 374 (1960).

Because of widespread abuses prevalent in the prosecution of personal injury claims, the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, made an order on February 3, 1959 authorizing and directing the Co-ordinating Committee on Discipline to conduct, under the personal supervision of the Presiding Justice of the Court, a continuing investigation into the conduct of attorneys in the prosecution and defense of personal injury claims and of those employed by or associated with them. This Committee is composed of the respective Chairmen of the grievance or discipline committees of the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association.

This case does not involve the usual bar association investigation of a complaint of an aggrieved client alleging neglect, conversion or some similar complaint which lends itself to adversary hearings in the investigative stage. It has been found by experience since 1929 in the State of New York

that conventional bar association grievance committees are not equipped to conduct general "ambulance-chasing" investigations, and the State Courts have used other approaches to cope with this continuing problem. This Committee does not generally operate on the basis of any specific complaint, and its investigative procedures are surrounded by safeguards to protect the rights of attorneys being investigated (see pp. 7, 8, *infra*).

Such an investigation as conducted by the Committee under the supervision of the Court is a non-adversary proceeding analogous to a Grand Jury proceeding, as was stated by the Court of Appeals of the State of New York more than thirty years ago in the landmark opinion of Chief Judge Cardozo in *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465 (1928), and that analogy was reiterated by this Court in *Anonymous 6 and 7* v. *Baker*, 360 U. S. 287 (1959).

In the course of such general inquiry, the Committee began a preliminary investigation of the professional practice of the petitioner on written notice to him dated June 9, 1961. The Committee heard the sworn testimony of a number of witnesses, including petitioner, who testified on June 20, 1961, October 9, 1962, December 18, 1962 and February 7, 1963. 291 pages of his sworn testimony were taken (R. 40).

Upon the conclusion of its preliminary investigation of petitioner's practice, the Committee, on March 12, 1963, filed a petition with the Appellate Division requesting leave to institute disciplinary proceedings, which application was granted by order of the Appellate Division dated March 14, 1963. Thereafter, on March 28, 1963, a petition was verified by the members of the Committee, with detailed charges of professional misconduct annexed, which papers

were personally served upon respondent, with notice of motion returnable before the Appellate Division on April 16, 1963. On May 16, 1963 the Appellate Division appointed a Referee to conduct hearings, to hear the evidence adduced and to report to the Appellate Division with his opinion whether such evidence sustains the charges in the petition. *The hearings before the Referee have not yet commenced, since this application by petitioner had the effect of delaying the commencement of the hearings.*

POINT I

The order sought to be reviewed is not a final order within the meaning of the Constitution of the State of New York, and the petition for a writ of certiorari should be denied on the ground of non-finality.

From the recital of the facts made above, it is clear that the order sought to be reviewed is an intermediary order, made in a disciplinary proceeding, which proceeding is presently pending, and the order sought to be reviewed does not finally determine that proceeding.

(A) Petitioner has not exhausted his remedies below. He has made no demand as yet for a bill of particulars.

Despite the fact that this disciplinary proceeding was initiated more than a year ago, petitioner has not yet made a demand for a bill of particulars (Pet. brief, p. 7). Petitioner argues by implication that he has not made the demand because such bill of particulars, when given, would not be satisfactory to him. This is patently an invalid argument. How can petitioner divine in advance what answers respondent would give to a demand for a bill of particulars not yet made? The complete answer is that,

should such an eventuality take place, petitioner would have adequate remedies to which to resort in the court below.

(B) The general policy of this Court is not to grant piecemeal review of litigation which has not been finally determined below.

The jurisdiction of this Court with respect to writs of certiorari to the highest court of a State is defined in Title 28, U. S. C., § 1257 and in Rule 19, §§ 1, 1(a) and 1(b) of the Rules of the Supreme Court of the United States, effective July 1, 1954; and none of the requirements laid down therein are met by the facts in this case.

As this Court held in *Parr* v. *United States*, 351 U. S. 513, 518, 519 (1955):

> ". . . In general, a 'judgment' or 'decision' is final for the purpose of appeal only 'when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.' *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.*, 108 U. S. 24, 28. This rule applies in criminal as well as civil cases. *Berman* v. *United States*, 302 U. S. 211, 212-213.
>
> . . . .
>
> "To hold this order 'final' at this stage of the prosecution would defeat the long-standing policy against piecemeal appeals."

This Court held in *Catlin* v. *United States*, 324 U. S. 229, 233-234 (1944):

> ". . . The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation. 'The case is not to be sent up in fragments. . . .' *Luxton* v. *North River Bridge*

> *Co.*, 147 U. S. 337, 341. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals."

See also, *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, 178 (1954).

Petitioner in his brief (p. 11) relies upon *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1448, and *Republic Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68 S. Ct. 972, 92 L. Ed. 1212 (1947). These cases are not controlling here. In *N. A. A. C. P.* v. *Alabama* there was involved an application to review a judgment of civil contempt, and this Court said in its opinion at pp. 466, 467:

> ". . . The proper method for raising questions in the state appellate courts pertinent to the underlying suit for an injunction appears to be by appeal, after a hearing on the merits and final judgment by the lower state court. Only from the disposition of such an appeal can review be sought here."

Republic Gas Co. v. *Oklahoma* is authority for the opposite of petitioner's contentions, since this Court said in that case, at page 67 of its opinion:

> "Ever since 1789, Congress has granted this Court the power of review in State litigation only after 'the highest court of a State in which a decision in a suit could be had' has rendered a 'final judgment or decree.' §237 of the Judicial Code, 28 U. S. C. §344, rephrasing §25 of the Act of September 24, 1789, 1 Stat. 73, 85. Designed to avoid the evils of piecemeal review, this reflects a marked characteristic of the federal judicial system, unlike that of some of the States. This prerequisite for the exercise of the appellate powers of this Court is especially pertinent when a constitu-

> tional barrier is asserted against a State court's decision on matters peculiarly of local concern. Close observance of this limitation upon the Court is not regard for a strangling technicality. History bears ample testimony that it is an important factor in securing harmonious State-federal relations."

and this Court stated further in *Republic Gas Co.*, at pp. 70-71:

> ". . . Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction. *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649, 651. The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction. See citation of cases in the concurring opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 341, 345, 348."

POINT II

Upon the merits, the petition for writ of certiorari should be denied, since the proceedings in the State Court adequately safeguard petitioner's rights.

(A) Safeguards in effect in the preliminary investigation and disciplinary proceeding:

(1) Petitioner was given written notice by respondent of the institution of the preliminary investigation of his practice in the prosecution of personal injury claims prior to the interrogation of any witnesses by the Committee.

(2) The investigation was directed only to *closed* accident cases.

(3) Petitioner was granted the privilege of being represented by counsel of his own choice when he was interrogated during the preliminary investigation, and his counsel was present and participated in the preliminary hearings (R. 41-43), even though this Court has held in *Anonymous 6 and 7 v. Baker*, cited *supra*, that in a preliminary investigation such as this, which is analogous to a Grand Jury investigation, counsel for an attorney may not be present in the hearing room during his interrogation.

(4) Witnesses other than petitioner who were interrogated during the preliminary investigation of petitioner's professional conduct were granted the right of counsel.

(5) Petitioner was permitted to obtain a copy of the transcript of his testimony given in the preliminary investigation.

(6) Petitioner will have a full day in court during the hearings to be held before the Referee; he will then be confronted with the witnesses who will testify against him; the rules of evidence will apply; he will be given the fullest opportunity to cross-examine such witnesses, and he will then have the use of the prior testimony, and exhibits in connection therewith, of the witnesses who testify for such purposes as he sees fit (R. 42, 43).

Willner v. *Committee on Character and Fitness*, 373 U. S. 96, 83 S. Ct. 1175, upon which petitioner relies (pp. 13-14 of pet. brief), has no applicability here. *Willner* involved questions of procedure before the Character Committee where there was no confrontation of witnesses against the applicant for admission to the Bar and no opportunity on the part of the applicant to cross-examine such witnesses, and no subsequent trial, as there is here in which such cross-examination may take place.

(B) As to disclosure of prior testimony of witnesses, respondent follows the rule laid down by the Court of Appeals in *People* v. *Rosario*.

Upon the trial of this matter, which is yet to take place before the Referee appointed by the Court below, whenever a witness for the Committee in the disciplinary proceeding completes his testimony upon direct examination, a copy of the transcript of his testimony in the preliminary inquiry, and any exhibits in connection therewith, will then be delivered to petitioner, and he may use such material for any purpose he sees fit. This is the rule laid down by the New York Court of Appeals in *People* v. *Rosario*, 9 N. Y. 2d 286, and the Committee follows that rule in disciplinary proceedings as a matter of fairness with the approval of the Appellate Division, First Department, which has passed upon this type of application a number of times (R. 39, 40).

The reason for not granting attorneys in disciplinary proceedings earlier access to the minutes of prior testimony given by witnesses in the preliminary investigation is that it opens the door to subornation of perjury, with which investigations of the prosecution of personal injury claims and disciplinary proceedings arising therefrom have been plagued for many years (R. 39, 40). See *Matter of Sparber*, 16 A. D. 2d 380 (1962); *Matter of Glassman*, 19 A. D. 2d 146 (1963); *Matter of Goldner*, 15 A. D. 2d 558 (1961); *Matter of Conjad*, 19 A. D. 2d 644 (1963), aff'd 14 N. Y. 2d 500 (1964); *In re Osofsky*, 259 App. Div. 718 (1940).

Investigations of the abuses prevalent in the prosecution of personal injury claims disclose widespread resort to the use of fraud, such as the submission to insurance carriers of fraudulent medical bills and reports, fraudulent statements of loss of earnings and fraudulent bills of

particulars. When there is *prima facie* evidence that the attorney investigated has been resorting to fraudulent practices, and the Appellate Division has authorized the bringing of charges against him, one would have to be naive indeed to believe that such an attorney, fighting to preserve his professional license at all costs, would not be tempted to resort to subornation of perjury with respect to the witnesses against him. It is the salutary policy of the state court not to facilitate subornation of perjury by disclosing the prior statements of witnesses until after such witnesses have given their testimony on direct examination at the trial.

(C) Section 3101 of the State Civil Practice Act and Rules does not apply to a disciplinary proceeding.

C. P. L. R. section 3101, relied upon by petitioner with respect to discovery and inspection, applies to ordinary civil actions and proceedings in the same way that the provisions of the prior Civil Practice Act did. Section 3101 of the C. P. L. R. is not controlling or dispositive with respect to a disciplinary proceeding, which does not fall within the category of an ordinary civil action or proceeding. A special situation exists with respect to discovery and inspection in disciplinary proceedings; and this situation has been passed upon by the Appellate Division, First Department, in four separate disciplinary proceedings over the past four years, and in each case that court unanimously denied motions such as that brought by petitioner (R. 39). Therefore, it may be said that the policy in this area has been established not by the Committee but by the State Court.

Petitioner devotes a great deal of discussion to the question "What type of proceeding is a disciplinary proceeding?" Obviously it is not a criminal proceeding (*Matter of*

Randel, 158 N. Y. 216); *Matter of Mathot*, 222 N. Y. 8, upon which petitioner relies heavily, is a 1917 decision which apparently has been cited only twice, both times in the same year of 1917 (*Matter of Braudmacher*, 222 N. Y. 522, and *Matter of Carpel*, 222 N. Y. 523). *Mathot* has not been cited since by the New York Court of Appeals in the past forty-six years. Of more significance here is *Cohen* v. *Hurley*, 7 N. Y. 2d 488, *aff'd*, 366 U. S. 117; petition for re-hearing denied, June 17, 1963, which indicates that a disciplinary proceeding, and the preliminary investigation which precedes it, are not ordinary civil proceedings, since that case holds that an attorney, as an officer of the court, must come forward and account for his professional conduct when called upon to do so by a duly authorized inquiry; and this is certainly not true with respect to a respondent or defendant in an ordinary civil proceeding.

A disciplinary proceeding, in our opinion, may be defined as a special type of civil proceeding, subject to such reasonable procedural orders as the Appellate Division of the Supreme Court, in the discretion granted to it under §90 of the Judiciary Law, shall direct. Some authorities state that a disciplinary proceeding is neither criminal nor civil (Drinker, *Legal Ethics*, page 36), and that it is *sui generis*, 58 Michigan Law Review 1218 *et seq.* (1960).

(D) The cases cited by petitioner on the subject of disclosure have no applicability here.

Petitioner relies upon the case of *Brady* v. *State of Maryland*, 373 U. S. 83 (1963). *Brady* involved suppression by the prosecution of a confession of guilt made by one defendant, which was material to the guilt or punishment of a second defendant who was convicted of murder in the first degree. The Court held that the prosecutor's failure to disclose this exculpatory evidence deprived the defen-

dant of due process. This decision has no relevancy to the facts in the instant case. A significant comment by this Court in *Brady* is as follows:

> "We usually walk on treacherous ground when we explore state laws for state courts, state agencies and state legislatures are its final expositors under our Federal system."

In *U. S. ex rel. Meers* v. *Wilkins*, 326 F. 2d 135 (C. C. A. 2), cited by petitioner, the prosecutor failed to disclose to the court and to the defense that he knew that two witnesses who were present at the scene of the robbery positively stated that they had not seen the defendant there. The Circuit Court of Appeals held, after the defendant had been convicted in the State court, that this suppression of evidence was a violation of due process. This case has no applicability to the facts here.

U. S. v. *Andolschek*, 142 F. 2d 503 (C. C. A. 2), cited by petitioner, concerns itself with the problem arising from the prosecution of a crime consisting of the very matters recorded in the suppressed document (*id.* at p. 506). That decision has no relevancy to the facts in this case.

Smith v. *Pennsylvania*, —— U. S. ——, 84 S. Ct. 763, cited by petitioner, turned upon a misapprehension on the part of State authorities as to what the Federal Bureau of Investigation was willing to disclose, and this court therefore remanded the case to make available to the defense certain material, disclosure of which the F. B. I. was not opposing.

On the general subject of disclosure in the case at bar, it is to be noted that petitioner has accessibility to all of the witnesses; he had prior relationships with all of the witnesses, and he knows who they are, since he was inter-

rogated at length about such prior relationships by the Committee (R. 40, 41).

When petitioner states that he was not confronted with the evidence against him (Pet. brief, p. 10), this is not a correct statement of the facts, as the record shows that he was confronted with the evidence against him and asked to explain his professional conduct (R. 40, 41).

(E) Reply to miscellaneous contentions by petitioner.

In the record submitted in support of this application certain recitals of fact by petitioner are not accurate.

(1) It is stated (R. 5):

> "... when the movant learned the nature of the accusations and sought to introduce evidence before the Coordinating Committee in his own behalf to show that he did not do what Dansker and Sapot said he did, the Coordinating Committee refused to hear such evidence."

This is not so. At petitioner's hearing in the preliminary investigation on December 18, 1962, Chairman Burns of the Coordinating Committee informed petitioner that if petitioner had any documentary evidence that he wished to bring in, the Committee would be glad to look at it at the next hearing (R. 41). *At the following hearing, on February 7, 1963, petitioner did not bring in any documentary evidence, thus indicating that he was not acting in good faith.* Petitioner is apparently more interested in his fruitless search to find some flaw in the Committee's procedures than he is in accounting for his professional conduct, as required by the controlling decision in the *Cohen* case, cited *supra*.

(2) It is stated in the moving papers that (R. 5):

> "While the movant was awaiting the decision of the Coordinating Committee on his demand to present evidence on his own behalf, the Committee submitted its petition to the Appellate Division . . ."

This is not so, as appears from the facts set forth in the record herein, and from the further fact that the Committee uniformly does not submit its petition to the Appellate Division until its preliminary investigation is concluded, as was the case in this matter.

(3) It is stated in the moving papers (R. 6):

> "As is seen from the opposing papers submitted, the Coordinating Committee did not question the materiality of the examinations sought. Neither did the Coordinating Committee question that adequate special circumstances existed for such discovery and examination."

This is not so. Again and again petitioner attempts to create the impression that the Co-ordinating Committee did not oppose his application below on the merits. This is quite contrary to the fact, as appears from the exhibits (R. 32-37), and from a reading of the affidavit in opposition of Committee's counsel (R. 38-43).

(4) It is stated (R. 8):

> "In the case at bar, the Coordinating Committee never disputed that there were adequate special circumstances to examine the financial records of Dansker and Sapot."

and, again (R. 10-11):

> ". . . The case for granting such an examination was clear and compelling and not even the Coordinating Committee opposed the application on the merits."

This is not so, as appears clearly from the aforementioned affidavit in opposition of Committee's counsel, particularly the following portion thereof (R. 43):

> "As part of the relief requested, respondent seeks a discovery and inspection of all of the financial records of Messrs. Sapot and Dansker. These financial records must be read together with the testimony given by Messrs. Sapot and Dansker in the preliminary investigation of the Committee. The financial records and the testimony are inextricably interwoven. That branch of the motion should be denied for the same reasons urged in connection with denial of the motion to reach the minutes prior to the time of the trial."

(5) As stated above at page 3, the Committee generally does not operate on the basis of a specific complaint or accusation of any person or persons against an attorney, and in this case it did not conduct its investigation of petitioner's professional conduct upon what petitioner describes as "accusations" of Dansker and Sapot. What the Committee did, as it was bound to do under the general directive contained in the February 3, 1959 order of the Appellate Division, was to conduct a general investigation of petitioner's conduct of his practice in the prosecution of personal injury claims. Many witnesses were interrogated under oath in the presence of an official court stenographer (R. 42), and the charges of misconduct that eventuated against petitioner are based upon the sworn testimony of many witnesses and upon documentary evidence gathered

by the Committee, and not just upon the testimony of Dansker and Sapot. Furthermore, the charges in the petition are not restricted to petitioner's relationships with Dansker and Sapot.

Petitioner states (p. 8 of his brief):

> "Dansker and Sapot (they were partners in a law firm) were allowed to plead to one count of the indictment to cover all counts and each received a suspended sentence on their promise to the sentencing court that they would furnish evidence to the Committee against 'someone' not named in the indictment. . . ."

There is no evidence whatsoever in this record to support the foregoing statement by petitioner.

Petitioner cites at page 12 of his brief one isolated case in the State court to support his application, *Matter of Friedman*, 17 A. D. 2d 644 (Second Judicial Dep't, 1962), leave to appeal denied 12 N. Y. 2nd 643. This case involved Malcolm Friedman, brother and former law partner of Mr. Justice Louis L. Friedman, who was subsequently removed from office by the New York State Court on the Judiciary, 12 N. Y. 2d, insert (a) following page 1111, cert. denied 375 U. S. 10. Apparently for reasons it deemed good and sufficient in that case alone, the Appellate Division, Second Department, made an exception to its general rule, and sustained an order granting disclosure of the preliminary testimony prior to trial. This case is no precedent, since the State court which made the decision has not followed it in subsequent cases.

(F) There is no constitutional issue in this case.

The fact that petitioner baldly asserts that he is being deprived of due process of law and that a constitutional issue exists in this case does not thereby create a constitutional issue. Petitioner has failed to state facts sufficient to make out a case that he is being deprived of any constitutional right. Far from receiving less than is his due by way of due process of law, the fact is that petitioner has received and is receiving substantially more by way of due process than has been held to be his due, as appears from the facts adverted to hereinabove and from the court decisions cited.

CONCLUSION

The petition for writ of certiorari should be denied.

April, 1964

Respectfully submitted,

HENRY WELNER
Attorney for Co-ordinating Committee on Discipline, Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1963

No. 970

In the Matter of

ANONYMOUS NO. 1, An Attorney,

Petitioner,

against

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

LEONARD FELDMAN, Esq.,
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IN THE

Supreme Court of the United States

OCTOBER TERM—1963

No. 970

In the Matter of

ANONYMOUS NO. 1, An Attorney,

Petitioner,

against

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

PETITIONER'S REPLY BRIEF

A reading of the respondent's brief in opposition to the petition makes the following facts manifest and undisputed:

(1) The respondent is in possession of and refuses to disclose evidence which is material and necessary to the petitioner's defense.

(2) The evidence being withheld by respondent is material, relevant and pertinent to the charges levelled against the petitioner.

It is equally clear from the respondent's brief that the respondent reserves unto itself the right to select from the documentary evidence and testimony at its disposal only that limited portion which it intends to produce at the hearings, and to withhold and not disclose any other

evidence, regardless of whether such other evidence is material, relevant and pertinent, or whether such other evidence is helpful to the petitioner's defense or exculpative of the petitioner. The respondent justifies this policy of secrecy on the ground that attorneys who are respondents in a disciplinary proceeding are not entitled to the same rights and procedural remedies as even the meanest litigant.

Respondent advances the notion that an attorney under charges is not entitled to the usual, ordinary and normal procedural remedies available to all other litigants because he may suborn perjury, even though the same risk of subornation exists whenever litigation exists; a risk, incidentally, not peculiar to attorneys' disciplinary proceedings. It is submitted that respondent's notion, if allowed to prevail would result in a doctrine which is abhorrent to all reasonable concepts of equality under law and fair play.

The respondent's brief ignores entirely the fact that petitioner seeks discovery in two specific categories: (a) specific financial records of certain witnesses, which records are available; and (b) other documents, statements and testimony which also are exonerative of the petitioner and in the possession of respondent. It simply takes the categoric position that a disciplinary proceeding is some sort of a special proceeding and an attorney who is under charges has only limited procedural rights. It cannot be ignored that respondent admits that it initiated and conducted the investigation of the petitioner; limited the extent of the inquiry it conducted by refusing to hear witnesses on the petitioner's behalf; initiated the disciplinary charges against petitioner; is prosecuting the trial of those charges and, now seeks to withhold evidence in its possession which petitioner needs for his defense.

With regard to the issue of "finality", this Court stated in *NAACP v. Alabama*, 357 U. S. 449, 457-458, 78 S. Ct. 1163, 1169, as follows:

> "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."

In *Republic Natural Gas Co. v. Oklahoma*, 334 U. S. 62, 68, 68 S. Ct. 972, 976 this Court has held that it will review an interlocutory decree where the controversy has proceeded to a point where the losing party will be irreparably injured if review is unavailable.

In the case at bar, the petitioner has the right to rely upon those procedural remedies which the courts have held are available to him in a proceeding of this sort. There can be no question, either, that the petitioner will be irreparably injured if the tactic of the respondent is permitted to thwart his defense. There is an immediate issue of due process and it is clear and compelling. Review at this time will eliminate that issue and allow the proceeding to proceed to conclusion on the merits and in the certainty that tactical maneuvers have not tainted the result.

CONCLUSION

No valid reason has been advanced by the respondent for denying the petition for a writ.

Respectfully submitted,

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Attorney for Petitioner.